



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

In Re: 10476346

DATE: AUG. 18, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, an electronic design computer software and sales business, seeks to employ the Beneficiary as a senior software developer. It requests advanced degree professional classification for the Beneficiary under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based “EB-2” immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wage.

On appeal the Petitioner asserts that the Director’s decision was erroneous and that the evidence of record establishes its ability to pay the proffered wage from the priority date of the petition onward.

Upon de novo review, we will withdraw the Director’s decision and remand the case for further consideration and the issuance of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. See section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

II. ANALYSIS

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date¹ of the petition onward. In this case the proffered wage is \$96,533 per year and the priority date is May 31, 2019.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

The Petitioner indicates that the Beneficiary's employment as a senior software developer began in November 2018. With its initial evidence in October 2019 and in response to the Director's request for evidence (RFE) in November 2019 the Petitioner submitted copies of all the biweekly pay statements issued to the Beneficiary from June 14, 2019, to November 1, 2019. They show that the Beneficiary's biweekly salary was \$3,461.54 for the pay periods ending on August 17, 2019, and for the pay periods beginning on August 18, 2019, the biweekly salary was increased to \$3,712.80. The Petitioner states that these figures reflect the raise in the Beneficiary's annual salary from \$90,000 to the proffered wage of \$96,533.² The Petitioner calculates that the difference between the proffered wage and the wages paid to the Beneficiary between the priority date of May 31, 2019, and the date the Beneficiary's salary was raised to the proffered wage level on August 18, 2019, was \$1,411.20, and asserts that it paid this difference in the form of a check to the Beneficiary, referencing the pay statements in the record. None of the pay statements up to November 1, 2019, indicate such a payment, however, and the Petitioner has not submitted copies any subsequent pay statements through the end of the year to document such a payment. Nor does the record include a copy of the Beneficiary's Form W-2, Wage and Tax Statement, for 2019, which would show his gross pay for the entire year. In fact, no 2019 Form W-2 was yet available to the Beneficiary at the time the Petitioner's appeal was mailed to USCIS in late December 2019. Thus, the documentation of record does not establish that the

¹ The "priority date" of the petition is the date the underlying labor certification application is filed with the DOL. See 8 C.F.R. § 204.5(d).

² Multiplying the pre-August 18, 2019, biweekly pay of \$3,461.54 by 26 would produce an annual salary of \$90,300.04. Multiplying the post-August 18, 2019, biweekly pay of \$3,712.80 would produce an annual salary of \$96,532.80.

Petitioner compensated the Beneficiary in an amount equal to or above the proffered wage from the priority date of May 31, 2019, through the end of the year.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

The record includes an "independent accountants' review report" from a CPA firm of financial data furnished by the Petitioner's management for the years 2017 and 2018. As indicated in the cover letter from the CPA firm, the accountants' review is not an audited financial statement, as required in the regulation at 8 C.F.R. § 204.5(g)(2). Even if it were an audited financial statement, the accountants' review covers the pre-priority date years of 2017 and 2018 and thus would not establish the Petitioner's ability to pay the proffered wage from the priority date onward. Moreover, at the time of the Director's decision in December 2019, and the Petitioner's appeal submitted to USCIS later that month, no audited financial statement would have been available, nor any federal tax return, nor any annual report, for the yet uncompleted year of 2019.

Without a copy of the Petitioner's 2019 federal tax return, or an audited financial statement for 2019, or an annual report for 2019, we are unable to determine the Petitioner's ability to pay the proffered wage based on its net income or net current assets from the priority date of May 31, 2019, onward. Therefore, we will remand this case so that the Director may request the submission of regulatory required evidence from the Petitioner, as specified in 8 C.F.R. § 204.5(g)(2), for the priority date year of 2019.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wage from the priority date of May 31, 2019, onward.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.